

STATE OF MICHIGAN
COURT OF APPEALS

TIMOTHY A. GROSSKLAUS,
Plaintiff-Appellee,

v

SUSAN R. GROSSKLAUS,
Defendant-Appellant.

UNPUBLISHED
November 21, 2006

No. 263376
Wayne Circuit Court
LC No. 98-816343-DM

Before: Cooper, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

In this action for divorce, defendant appeals by leave granted the trial court's order granting plaintiff's motion to vacate the arbitration award on the ground that the arbitrator was biased and exceeded his authority in disposing of the parties' assets. On review de novo, we agree that the arbitrator exceeded his authority in disposing of a portion of the parties' assets, but find no support for the trial court's conclusion that the arbitrator was otherwise biased in its disposition of the parties' property. Consequently, we affirm in part, reverse in part, and remand for further proceedings.

Parties to a divorce action may consent to binding arbitration through a signed agreement providing for an award on disputed matters, including property division. See MCL 600.5071. Although courts generally must enforce an award arising from such an agreement, MCL 600.5079(1), a court is obligated to vacate an arbitration award where there is "evident" partiality by the arbitrator or the arbitrator exceeded his or her powers, MCL 600.5081(2). Judicial review of a binding arbitration award is, however, "strictly limited by statute and court rule." *Krist v Krist*, 246 Mich App 59, 66; 631 NW2d 53 (2001). "Partiality or bias which will allow a court to overturn an arbitration award must be certain and direct, not remote, uncertain or speculative." *Belen v Allstate Ins Co*, 173 Mich App 641, 645; 434 NW2d 203 (1988). A trial court's decision that an arbitration award must be vacated on the ground of bias or the exceeding of the arbitrator's authority is reviewed de novo. See *Tokar v Alberty*, 258 Mich App 350, 352; 671 NW2d 139 (2003).

Here, in vacating the arbitration award on the ground of bias the trial court relied, in part, on the arbitrator's unequal division of property. The arbitrator, however, found that substantial fault by plaintiff supported an unequal division of the marital estate in favor of defendant. Although "[t]he objective of [a] property settlement is to reach a fair and equitable division in light of all the circumstances," it is well settled that such division need not be equal to be

equitable. *Ackerman v Ackerman*, 163 Mich App 796, 807; 414 NW2d 919 (1987). It is also well settled that fault may be considered when dividing marital property. *Sparks v Sparks*, 440 Mich 141, 158-160; 485 NW2d 893 (1992). Because fault was a valid consideration for dividing the marital estate, it cannot be said that the arbitrator exhibited bias against plaintiff by dividing the marital estate unequally on that ground.

The arbitrator's sequestering of separate or premarital property also does not demonstrate bias. To the contrary, the award in this matter indicates that the arbitrator presumed that assets were part of the marital estate unless the party asserting a claim of separate property proved by a preponderance that the assets were premarital or otherwise separate. The award further indicates that the arbitrator distinguished assets as separate from the marital estate only if they had not been commingled with marital assets and the premarital origin of the asset was clearly traceable. These standards are neutral and do not demonstrate bias. Although the trial court apparently believed that the arbitrator nonetheless erroneously included within the marital estate assets that were in fact the separate property of plaintiff, the court failed to identify the assets believed by it to have been erroneously included in the marital estate. The trial court's finding that the division of property showed "certain and direct" bias by the arbitrator is thus speculative and unsupported. *Belen, supra*.

The trial court also concluded that bias existed because the arbitrator elicited additional information from one litigant but not from the other. The court did not, however, explain this conclusion and there is no record from the arbitration to support it. Given this absence of explanation or record support, we cannot agree that the "certain and direct" bias necessary to vacate the arbitrator's award on this ground is demonstrated by the award. *Id.*; see also *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991).

Nor do we conclude, as did the trial court, that the arbitrator demonstrated bias by awarding the Island Building Company (IBC). Although this award by the arbitrator contravened the trial court's earlier order that the IBC not be awarded to either party without their consent, disposition of the IBC does not itself demonstrate "certain and direct" bias against plaintiff. Nonetheless, we agree with the trial court that the arbitrator exceeded his authority in making this award without the apparent consent of the parties, as required by the parties' arbitration agreement, which incorporated the limitations on disposition ordered by the trial court. See *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996) (an arbitrator exceeds his authority when he acts beyond the material terms of the contract from which he draws his authority). The remedy for this transgression, however, is not to vacate the entirety of the arbitrator's award. Indeed, our Supreme Court has indicated that to justify the vacation of an arbitration award on the basis of error by the arbitrator, the error must be so material as to substantially affect the award. See *Gordon Sel-Way, supra*. Here, neither party has clearly demonstrated that the IBC comprised a substantial portion of their total marital assets, such that its disposition was materially substantial to the overall award. Therefore, the proper remedy is to vacate only that portion of the arbitrator's award disposing of the IBC and return the case to the arbitrator with instructions to dispose of that asset according to the terms of the arbitration agreement.

Defendant next argues that the trial court erred in failing to find that plaintiff concealed an interest in the Coleman property from the arbitrator. We do not agree.

Like fault, a party's attempt to conceal assets is relevant to the equitable division of marital property. *Sands v Sands*, 442 Mich 30, 36; 497 NW2d 493 (1993). However, the arbitration award in this case indicates that the parties "litigated" the issue whether plaintiff held an interest in the Coleman property before the arbitrator, but that the arbitrator found insufficient proof of ownership to include the property within the marital estate. Defendant argues on appeal, as she did in the trial court, that the arbitrator's finding in this regard was erroneous. But "[c]laims that the arbitrator made a factual error are beyond the scope of appellate review." *Konal v Forlini (On Remand)*, 235 Mich App 69, 75; 596 NW2d 630 (1999). Defendant apparently failed during arbitration to submit evidence sufficient to convince the arbitrator of plaintiff's interest in the Coleman property. She may not now seek to reopen arbitration where she had the opportunity to present evidence regarding the Coleman property, but failed to take advantage of it. The trial court was not authorized to sit in judgment of the merits of the arbitrator's conclusion that plaintiff did not have an interest in the Coleman property. See *Gordon Sel-Way, supra*. The trial court was charged only with determining whether plaintiff made a misrepresentation of fact in the arbitration and, as noted by the trial court, there is no record from the arbitration demonstrating any such misrepresentation.¹

Finally, defendant argues that this Court should remand to a different judge. This Court may choose to remand a case to a different lower court judge if the record indicates that the original judge would have difficulty putting previously expressed views or findings out of mind. *Feaheny v Caldwell*, 175 Mich App 291, 309-310; 437 NW2d 358 (1989). For the reasons that follow, we decline to remand this matter to a different judge.

A party challenging the impartiality of a judge must overcome a heavy presumption of judicial impartiality. *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003). "In general, the challenger must prove a judge harbors actual bias or prejudice for or against a party or attorney that is both personal and extrajudicial." *Id.* (citations omitted). However, that a judge repeatedly rules against a litigant, even if those rulings are erroneous, does not establish disqualification based on bias or prejudice. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597-598; 640 NW2d 321 (2001). Critical or hostile remarks made by a trial court judge to counsel or the parties also do not, as a general matter, establish disqualifying bias. *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996).

Here, the trial judge appeared to be strongly of the opinion that the arbitrator was biased, and that the arbitrator's award must be set aside. However, the mere fact that the trial judge held such opinion does not establish that he will be unable to set aside that inclination on remand. We see no reason why the trial judge will be unable to follow this Court's instructions on remand. Although the trial court has made more than one erroneous ruling in this case, and such rulings

¹ In support of her claim that plaintiff failed to disclose an interest in the Coleman property, defendant repeatedly references plaintiff's deposition testimony in an unrelated case. However, by failing to make a copy of the deposition on which she relies a part of the record in this matter, defendant has abandoned any argument premised on such testimony. See *Taylor v Blue Cross & Blue Shield of Michigan*, 205 Mich App 644, 654; 517 NW2d 864 (1994).

went against defendant, rulings against a litigant, even if those rulings are erroneous, do not establish disqualification based on bias or prejudice. *Armstrong, supra*. A review of the transcript and orders in this case does not reveal any personal prejudice or bias on the part of the trial court.

We affirm the trial court's finding that the arbitrator exceeded his authority by disposing of the IBC without the apparent consent of the parties, but reverse the court's conclusion that the arbitrator was otherwise biased in its division of property and remand this matter for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper

/s/ Joel P. Hoekstra

/s/ Michael R. Smolenski